

1 ANDREW S. CLARE (SBN 050289)
 2 aclare@loeb.com
 3 MARK D. CAMPBELL (SBN 180528)
 4 mcampbell@loeb.com
 5 DAVID GROSSMAN (SBN 211326)
 6 dgrossman@loeb.com
 7 LOEB & LOEB LLP
 8 10100 Santa Monica Blvd., Suite 2200
 9 Los Angeles, California 90067-4120
 10 Telephone: (310) 282-2000
 11 Facsimile: (310) 282-2200

12 DANIEL SILVERMAN (SBN 137864)
 13 dsilverman@roll.com
 14 JOIE MARIE GALLO (SBN 178064)
 15 jgallo@roll.com
 16 ROLL INTERNATIONAL CORP.
 17 LEGAL DEPT.
 18 11444 West Olympic Blvd., 10th Floor
 19 Los Angeles, California 90064-1557
 20 Telephone: 310-966-5700
 21 Facsimile: 310-966-5758

22 Attorneys for Plaintiff
 23 POM WONDERFUL LLC

MARC T.G. DWORSKY (SBN 157413)
Marc.Dworsky@mto.com
 GREGORY D. PHILLIPS (SBN 118151)
Gregory.Phillips@mto.com
 MUNGER, TOLLES & OLSON LLP
 355 South Grand Avenue
 Thirty-Fifth Floor
 Los Angeles, CA 90071-1560
 Telephone: (213) 683-9100
 Facsimile: (213) 687-3702

MARTIN D. BERN (SBN 153203)
Martin.Bern@mto.com
 ALISON J. MARKOVITZ (SBN
 219716)
Alison.Markovitz@mto.com
 MUNGER, TOLLES & OLSON LLP
 560 Mission Street
 Twenty-Seventh Floor
 San Francisco, CA 94105-2907
 Telephone: (415) 512-4000
 Facsimile: (415) 512-4077

Attorneys for Defendant
 THE COCA-COLA COMPANY

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

16 POM WONDERFUL LLC, a Delaware
 17 limited liability company,

18 Plaintiff,

19 v.

20 THE COCA-COLA COMPANY, a
 21 Delaware corporation; and DOES 1-10,
 inclusive,

22 Defendants.

Case No. CV-08-06237 SJO (FMOx)

DISCOVERY MATTER

**PLAINTIFF'S NOTICE OF
 MOTION AND MOTION TO
 COMPEL DOCUMENT
 PRODUCTION (L.R. 37-2 JOINT
 STIPULATION); DECLARATION
 OF DANIEL A. BECK AND
 [PROPOSED] ORDER**

Hearing:

Hon. Fernando M. Olguin

Date: August 5, 2009

Time: 10:00 a.m.

Place: Courtroom F, 9th Floor
 312 North Spring Street

Discovery cutoff: Dec. 9, 2009

Pretrial conference: March 1, 2010

Trial date: March 9, 2010

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 5, 2009 at 10:00 a.m. or as soon
 3 thereafter as this matter may be heard, in Courtroom F (9th Floor) of the United
 4 States District Court for the Central District of California, 312 North Spring Street,
 5 Los Angeles, California, before the Honorable Fernando M. Olguin, United States
 6 Magistrate Judge, Plaintiff POM WONDERFUL LLC ("Pom Wonderful" or
 7 "Plaintiff") will move and hereby does move for entry of an order compelling
 8 Defendant The Coca-Cola Company ("TCCC") to produce documents in response to
 9 Pom Wonderful's First Set of Request for Production of Documents (the "Request"
 10 or "Requests").

11 Pom Wonderful served its Requests on TCCC on or about April 15, 2009.
 12 TCCC provided written responses on or about June 2, 2009. TCCC's responses
 13 were deficient for the reason, among others, that TCCC refuses to produce
 14 documents relating to the naming, labeling and packaging of its Pomegranate
 15 Blueberry juice product.

16 On June 4, 2009, Pom Wonderful's counsel requested in writing a discovery
 17 conference with TCCC's counsel, pursuant to Local Rule ("L.R.") 37-1, to discuss
 18 TCCC's responses and objections to Pom Wonderful's Request. See Declaration of
 19 Daniel A. Beck (attached to the Joint Stipulation), Exhibit A (June 4, 2009 letter).
 20 The discovery conference occurred on June 15, 2009. During the discovery
 21 conference, TCCC refused to produce the documents requested by Pom Wonderful.

22 This Motion is made pursuant to L.R. 37-2 and is based on the parties'
 23 attached Joint Stipulation and the exhibits and declarations attached thereto, any
 24 supplemental memoranda subsequently filed, such additional evidence and
 25 argument as may be presented at the hearing on this motion, all of the pleadings,
 26 files and records in this proceeding, and such other evidence as may later be
 27 submitted.

1 A copy of the initial scheduling order in this action is attached as Exhibit B
2 to the Beck Declaration.

3 Dated: July 10, 2009

4 ROLL INTERNATIONAL CORPORATION
5 LEGAL DEPARTMENT

6 By: /s/ Daniel S. Silverman
7 Daniel S. Silverman
8 Attorneys for Plaintiff
9 POM WONDERFUL LLC
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I.	INTRODUCTORY STATEMENTS.....	1
A.	Pom Wonderful's Introductory Statement	1
B.	TCCC's Introductory Statement.....	4
II.	ISSUES IN DISPUTE	7
A.	TCCC's Objections To Producing Its Naming, Labeling, and Packaging Documents	7
B.	Pom Wonderful's Position Re: TCCC's Objections To Producing Its Naming, Labeling, And Packaging Documents.....	8
1.	Judge Otero's Order Permitted Pom Wonderful's Lanham Act Claim To Proceed Against The Pomegranate Blueberry Product's Naming, Labeling, and Packaging.	9
2.	Judge Otero's Order Permitted Pom Wonderful's State Law Claims Under Cal. Bus. & Prof. Code §§ 17200 and 17500 To Proceed Against The Pomegranate Blueberry Product's Naming, Labeling, and Packaging.....	12
3.	TCCC's Interpretation of the Otero Order's Ruling on Preemption is Erroneous..	15
4.	Documents Relating to the Naming, Labeling, and Packaging of the Pomegranate Blueberry Product are Relevant to Pom Wonderful's Claims that the Product's Marketing and Advertising is False and Misleading.	17
C.	TCCC's Position Re: Its Objections To Producing Its Naming, Labeling, and Packaging Documents	20
1.	Judge Otero Dismissed Pom's Lanham Act and State Law Claims Based On The Name and Label of The Minute Maid Pomegranate Blueberry Flavored Blend of 5 Juices Product.....	21
2.	Pom Has Not Asserted Any Claims Regarding The Product's Name or Labeling Other than Those Already Dismissed from The Case.	24
3.	Pom's State Law Claims Regarding The Formal Name and Labeling of The Product Were Dismissed.	25

1	4.	Pom's Attempt To Define "Advertising and	
2		Marketing" As Including the Name and Label of the	
3		Product Is A Transparent End-Run Around The	
4		Court's Ruling.	26
5	5.	TCCC's Discovery Requests Are Not At Issue Here.	27
6	III.	THE DISPUTED DOCUMENT REQUESTS AND TCCC'S	
7		RESPONSES	28
8	IV.	CONCLUSIONS	39
9	A.	Pom Wonderful's Conclusion	39
10	B.	TCCC's Conclusion.....	39
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

THE PARTIES' RULE 37-2 JOINT STIPULATION

I. INTRODUCTORY STATEMENTS

A. Pom Wonderful's Introductory Statement

Plaintiff POM WONDERFUL LLC ("Pom Wonderful" or "Plaintiff") respectfully requests that the Court order Defendant The Coca-Cola Company ("TCCC") to produce a complete set of documents in response to Pom Wonderful's First Set of Request for Production of Documents ("Request").

Pom Wonderful's Complaint asserts false advertising claims against TCCC pursuant to (1) the Lanham Act, 15 U.S.C. § 1125(a); (2) Cal. Bus. & Prof. Code § 17200, and; (3) Cal. Bus. & Prof. Code § 17500, accusing TCCC of misleading and deceiving consumers into believing that its Minute Maid Enhanced Pomegranate Blueberry juice product (the "Pomegranate Blueberry Product") primarily contains pomegranate and blueberry juice, when it actually contains primarily apple juice and grape juice, and includes relatively little pomegranate or blueberry juice. See Complaint, ¶¶ 17-26. TCCC thereby sought to capitalize on consumers' desire for the health benefits provided by pomegranate juice, benefits which are known due to scientific research that Pom Wonderful has funded and publicized. Id., ¶¶ 12-16. The Complaint asserts that TCCC has utilized deceptive marketing, advertising, naming, labeling, and packaging for its Pomegranate Blueberry Product. Id. ¶¶ 17-26. Consistent with the broad scope of discovery permitted under Fed. R. Civ. P. 26(b)(1), Pom Wonderful propounded Requests that are reasonably calculated to lead to the discovery of admissible evidence in support of its claims, and in rebuttal of TCCC's defenses.

In response to Pom Wonderful's Requests, TCCC has refused to produce documents relating to the product's naming, labeling, or packaging.¹ See Section

¹ Coca Cola refused to produce such documents in response to Requests nos. 13-18, 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, and 53. Each of these Requests, and Coca Cola's response, is quoted in full below in Section III.

1 II(A), infra (TCCC's objections). TCCC falsely contends that Pom Wonderful's
 2 claims regarding the product's naming, labeling, and packaging were dismissed by
 3 Judge Otero's February 10, 2009 Order Granting in Part, Denying in Part
 4 Defendant's Motion to Dismiss [Docket No. 8] (the "Otero Order") (attached as
 5 Exhibit C to the Declaration of Daniel A. Beck ("Beck Decl."), which is attached to
 6 this Joint Stipulation). The Otero Order directly refutes TCCC's position. Judge
 7 Otero held that "the Court is largely unpersuaded by TCCC's argument, as TCCC's
 8 **argument does not address the majority of Pom's Lanham Act claim.**" Otero
 9 Order, at 7 (emphasis added). Accordingly, TCCC's motion was granted "**only to**
 10 **the extent it challenges the Juice's formal name and labeling in areas for which**
 11 **the FDA has promulgated regulations implementing the FFDCA.**" Id.
 12 (emphasis added). The Otero Order thus permits Pom Wonderful's Lanham Act
 13 claim against the product's naming, labeling, and packaging, except regarding
 14 "formal name and labeling in areas for which the FDA has promulgated regulations
 15 implementing the FFDCA." Id.

16 With respect to Pom Wonderful's California law claims under Sections 17200
 17 and 17500, Judge Otero permitted Pom Wonderful's claims to the extent they are
 18 identical to the FFDCA and its implementing FDA regulations. See Otero Order, at
 19 11. Pom Wonderful's state-law claims against the naming, packaging, and labeling
 20 of the Pomegranate Blueberry Product are therefore not preempted because they are
 21 identical to the FFDCA and its implementing FDA regulations. Pom Wonderful
 22 further has moved, unopposed, for leave to file a [Proposed] First Amended
 23 Complaint, which alleges as a predicate for its Section 17200 claim that TCCC has
 24 violated California's Sherman Food, Drug, and Cosmetic Law, Health & Safe. Code
 25 § 109875 *et seq.* (the Sherman Law). See Beck Decl., Exh. D. Preemption does not
 26
 27
 28

1 apply to such a claim, which Pom Wonderful asserts against the product's naming,
2 labeling, and packaging.

3 Even assuming, *arguendo*, that TCCC's interpretation of the Otero Order was
4 correct, TCCC's naming, labeling, and packaging documents fall squarely within
5 the scope of materials discoverable under Fed. R. Civ. P. 26(b)(1). TCCC concedes,
6 as it must, that Pom Wonderful's claims against TCCC's marketing and advertising
7 of its Pomegranate Blueberry Product remain in the case. TCCC's marketing
8 strategy has determined the naming, labeling, and packaging of its Pomegranate
9 Blueberry Product. That naming, labeling, and packaging is a significant aspect of
10 the product's marketing. FDA regulations did not require TCCC to name its product
11 "Pomegranate Blueberry," as opposed to "Grape Apple" or myriad other options.
12 TCCC made that decision because of its marketing strategy. Similarly, FDA
13 regulations did not require TCCC to place a pomegranate image on its label in
14 conjunction with the name "Pomegranate Blueberry." TCCC made that decision
15 because of its marketing strategy. The naming, labeling, and packaging of the
16 Pomegranate Blueberry Product inherently evidences TCCC's continuing desire to
17 mislead consumers to believe its product is "Pomegranate Blueberry" juice, which is
18 further exemplified by its current advertising. TCCC's naming and labeling
19 documents are highly relevant to Pom Wonderful's claims that TCCC's marketing
20 and advertising intentionally misleads consumers – and Pom Wonderful's Requests
21 for those documents will lead to the discovery of admissible evidence.

22 Finally, TCCC has propounded its own document requests seeking Pom
23 Wonderful's naming, labeling, and packaging documents, which Pom Wonderful is
24 producing. TCCC cannot reasonably seek these documents from Pom Wonderful
25 while refusing to produce its own documents. TCCC should be ordered to make a
26 full production of documents in response to Pom Wonderful's Requests nos. 13-18,
27 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, and 53.

1 B. TCCC's Introductory Statement

2 In its detailed order granting in part and denying in part a motion to dismiss
3 brought by defendant The Coca-Cola Company ("TCCC"), the Court concluded that
4 Pom Wonderful's ("Pom's") Lanham Act and state law claims could not proceed
5 with respect to the "naming," "labeling," and "packaging" of the Minute Maid juice
6 blend product at issue in this case. *See* Order Granting in Part, Denying in Part
7 Defendant's Motion to Dismiss [Docket No. 8] (the "Order") (attached as Exhibit C
8 to the Declaration of Daniel A. Beck.) The Court, however, denied a portion of
9 TCCC's motion and allowed Pom to pursue its remaining allegations that TCCC had
10 "*otherwise advertised and marketed* its product in a misleading manner that leads
11 consumers to believe that the primary ingredients" in the Product "are pomegranate
12 and blueberry" juice. *Id.* (emphasis added). Notwithstanding this ruling, Pom has
13 pursued discovery of its dismissed claims as to the naming, labeling and packaging
14 of the Minute Maid juice blend product as though the Court's order did not exist,
15 thereby setting up what is effectively a motion for reconsideration of the Court's
16 prior order addressed to the Magistrate Judge as a discovery dispute. TCCC
17 believes that the Court said what it meant and meant what it said in the Order, and
18 that discovery on claims that have been dismissed from the case is now foreclosed,
19 notwithstanding Pom's attempt to relitigate these issues.²

20 This case is one of four actions brought by Pom in the Central District against
21 defendants who sell fruit juice blends flavored with pomegranate juice and natural
22 pomegranate flavorings. At the heart of Pom's litigation campaign is the legally
23 erroneous claim that manufacturers of juice blends cannot legally name their

24 _____
25 ² Nearly four months after the Court issued its Order dismissing its naming and
26 labeling-based claims, Pom has sought leave of Court to amend its complaint in an
27 effort to reintroduce the product name and label into this case. If the Court grants
28 this request, TCCC will move to dismiss Pom's new legal theory, which is legally
deficient for multiple reasons. Accordingly, Pom's presently unfiled and untested
amended complaint cannot serve as a basis for discovery at this time.

1 products according to their predominant flavor unless that flavor corresponds with
2 the predominant juices in the blend.³

3 The premise underlying Pom's claims is that consumers purchase
4 pomegranate blueberry flavored beverages solely for the alleged heart and prostate
5 benefits that Pom has touted in its marketing. Even though TCCC has never made
6 functional health claims for its Minute Maid Enhanced Pomegranate Blueberry
7 Flavored Blend of 5 Juices that are related in any way to pomegranate or blueberry
8 juices, and has instead touted the brain function benefits of the added Omega-
9 3/DHA in the beverage, Pom nevertheless objects to the inclusion of the words
10 "pomegranate" and "blueberry" in the name of the product to describe its flavor.

11 The FDA, however, has rejected the very premise of Pom's complaint – that it
12 is "unscrupulous" to use the word "pomegranate" in the name of a product that
13 contains little pomegranate juice (§16), and that consumers are "wrongfully
14 trick[ed]" (§24) by such names. Instead, the FDA has determined that it is
15 acceptable and not misleading to use the name of a juice that provides the "flavor."
16 The word "flavored" adequately informs consumers of the nature of the product. In
17 adopting this final rule, the FDA stated "that manufacturers can use a product name
18 that identifies the juice that provides the characterizing flavor and specifically shows
19 that the juice is used to flavor the product. . . . The agency believes that using the
20 term 'flavor' with the name of the characterizing juice will inform the consumer that
21 the juice is present in an amount sufficient to flavor the beverage but will not imply
22 that the content of that juice is greater than is actually the case. . . . Accordingly,
23 FDA is providing in §102.33(d)(1) that *a multiple-juice beverage may use a product*
24 *name that specifically shows that the named juice is used as a flavor.*" 58 FR 2897

25 ³ Thus, according to Pom, consumers who are paying roughly \$0.06 per ounce
26 for the Minute Maid Pomegranate Blueberry Flavored Blend of 5 Juices may think
27 they are getting the same juices as those contained in Pom's 100% pomegranate
28 blueberry juice product costing between \$0.21-\$0.31 per ounce, which is 300 to
500% more expensive than the Minute Maid Enhanced Juice product.

1 at 2921, ¶50; *see also* 58 FR 2897 at 2900 ¶10 (emphasis added)(“ [F]or beverages
 2 where one or more but not all the juices are named and the named juice is not the
 3 predominant juice, the agency is providing two alternatives for describing the
 4 contribution of the named juice. The label must either state that the beverage is
 5 flavored by the named juice (e.g. “raspberry flavored juice drink”) or declare the
 6 content of the named juice in a 5 percent range (e.g., “raspberry juice drink 2 to 7
 7 percent raspberry juice”). The agency believes that this approach will adequately
 8 deal with the kinds of misleading labeling discussed in the comments from
 9 consumer groups.”)

10 Nowhere in its complaint has Pom alleged that TCCC’s product label fails to
 11 comply to the letter with the requirements of the juice naming and labeling
 12 regulations that the FDA expressly found would result in a name and label that
 13 would be adequate and non-misleading. Rather, Pom simply disagrees with the
 14 FDA’s considered opinion regarding how juices should be named and labeled, and
 15 has asked four different courts in this busy District to impose Pom’s new and
 16 different “predominance” standard for juice naming and labeling. Judge Otero
 17 roundly rejected this attempt in a well-reasoned decision that tossed out of the case
 18 Pom’s claims based on the highly regulated common name and labeling of the
 19 product, but allowed Pom to proceed on the basis of its allegations in the complaint
 20 that defendant’s “advertising” and “marketing” for the juice product somehow
 21 misled consumers into believing that the product was “predominantly” pomegranate
 22 and blueberry juice. Pom’s recent discovery responses reveal that Pom’s
 23 “advertising and marketing” claims consist largely of the *same allegations*
 24 *regarding the product name and label that the Court found to be non-actionable.*
 25 *See Pom’s Response to Interrogatory No. 7, Beck Decl., Exh. I.* Left to prosecute a
 26 vestigial case that is devoid of factual support, Pom has instead opted to
 27 manufacture this discovery dispute as a mechanism to seek reconsideration of the
 28 Court’s motion to dismiss order.

II. ISSUES IN DISPUTE

A. TCCC's Objections To Producing Its Naming, Labeling, and Packaging Documents

TCCC has asserted General Objections Nos. 13 and 14 in response to all of Pom Wonderful's Requests, stating as follows:

13. Defendant objects to Plaintiff's requests for documents regarding the naming, labeling and packaging of the BEVERAGE, including documents that are included within the scope of the term "labeling" as interpreted by the FDA and Courts, in light of the Court's ruling dismissing all such claims from the case.

14. Defendant objects to Plaintiff's requests for documents regarding the naming, labeling and packaging of the BEVERAGE, including marketing and advertising that does not contain any substantive information beyond the name, labeling and packaging of the BEVERAGE, in light of the Court's ruling dismissing all such claims from the case.

In addition to these General Objections, TCCC has asserted the following specific objection in response to Requests Nos. 13-18, 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, and 53:

Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiff's claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case.

B. Pom Wonderful's Position Re: TCCC's Objections To Producing Its Naming, Labeling, And Packaging Documents

In contravention of Fed. R. Civ. P. 26(b)(1) and Judge Otero's Order, TCCC has withheld documents in response to Pom Wonderful's Requests Nos. 13-18, 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, and 53.⁴ Those Requests seek documents with core relevance to Pom Wonderful's false advertising claims against TCCC's Pomegranate Blueberry Product. For example:

- Request no. 15: "All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to the design of the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.
- Request no. 24: "All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to YOUR use of the phrase "Pomegranate Blueberry" on the label of the POMEGRANATE BLUEBERRY JUICE PRODUCT.
- Request no. 53: "All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to the naming of the POMEGRANATE BLUEBERRY JUICE PRODUCT."

See Section III, below (quoting the verbatim text of each of the disputed Requests and TCCC's response).

For each of the disputed Requests, TCCC has erroneously objected that "Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiff's claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case." See Section III. Judge Otero's

⁴ Based on its objections, Coca Cola refused to produce *any* documents responsive to Requests Nos. 15, 16, 26, 27, 31, 34, 36, 37, 41, 44, 45, and 53. See Section III, *infra*. On the same objections, Coca Cola further responded that it will *limit* its production of documents sought by Requests Nos. 13, 14, 17, 18, 20, 22, 24, 39, and 40. *Id.*

Order refutes TCCC's contention that all claims against the Pomegranate Blueberry Products' naming, labeling and packaging have been dismissed, however. Moreover, the documents are independently relevant to Pom Wonderful's claims which attack the product's marketing and advertising – claims which even TCCC concedes, as it must, remain active in this case. Accordingly, TCCC must make a full production of the documents responsive to Requests Nos. 13-18, 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, and 53.

1. Judge Otero's Order Permitted Pom Wonderful's Lanham Act Claim To Proceed Against The Pomegranate Blueberry Product's Naming, Labeling, and Packaging.

Judge Otero denied most of TCCC's motion to dismiss Pom Wonderful's Lanham Act claim, ruling that "the Court is largely unpersuaded by TCCC's argument, as **TCCC's argument does not address the majority of Pom's Lanham Act claim.**" Otero Order, at 7 (emphasis added). Instead, Pom Wonderful's Lanham Act claim was dismissed "**only to the extent it challenges the Juice's formal name and labeling in areas for which the FDA has promulgated regulations implementing the FFDCA.**" *Id.* (emphasis added). Ignoring this plain language, TCCC seeks to interpret the Otero Order as dismissing all of Pom Wonderful's claims based on the product's naming, labeling, and packaging. Had Judge Otero wanted to make that ruling, his Order would have simply said so. By its express terms, however, the Otero Order permitted Pom Wonderful's Lanham Act claim to continue to challenge the Pomegranate Blueberry Product's naming, labeling, and packaging apart from its formal name and labeling in areas for which the FDA has promulgated regulations implementing the FFDCA.

The names, labeling, and packaging which TCCC uses for its Pomegranate Blueberry Product do not consist entirely of FDA-regulated formal names and labeling, and Pom Wonderful's Lanham Act claim was therefore not dismissed against them. For example, Judge Otero's Order found that TCCC occasionally

1 identifies its Blueberry Juice Product as “Pomegranate Blueberry.”⁵ See Otero
 2 Order at 2, n. 1. TCCC repeatedly refers to its product as “Minutemaid Enhanced
 3 Pomegranate Blueberry” and “Pomegranate Blueberry,” both in marketing and
 4 advertising and on its product labels and packaging. See, e.g., Beck Decl., Exh. G
 5 (color copy of <http://www.minutemaid.com/PomegranateBlueberry.jsp>). Those
 6 names for the product do not constitute “formal name and labeling in areas for
 7 which the FDA has promulgated regulations implementing the FFCDA.”

8 Similarly, the Otero Order did not determine – nor can TCCC establish – that
 9 all aspects of the Pomegranate Blueberry Product’s label constitute formal name and
 10 labeling choices made pursuant to FDA regulations. No FDA regulations required
 11 TCCC to call its product “Pomegranate Blueberry.” No FDA regulations required
 12 TCCC to display pictures of pomegranates and blueberries on its product’s label.
 13 Those marketing-driven images do not constitute the product’s “formal name and
 14 labeling,” and were not placed on the label in order to comply with FDA
 15 regulations. They are squarely within the scope of Pom Wonderful’s Lanham Act
 16 claim.

17 Confirming the legal error in TCCC’s position, Judge A. Howard Matz of the
 18 Central District recently analyzed the Otero Order in the context of a similar false
 19 advertising lawsuit between Pom Wonderful and Welch Foods, Inc. On June 23,
 20 2009, Judge Matz issued an order denying a motion to dismiss filed by Welch
 21 Foods, Inc. (the “Matz Order”). See Beck Decl., Exh. H. The Matz Order
 22 recognized that Judge Otero’s Order does not preclude Pom Wonderful’s Lanham
 23

24 ⁵ “Coca Cola takes issue with the Complaint’s consistent reference to the
 25 product at issue as ‘Pomegranate Blueberry’ without using the full name of the
 26 product, ‘Pomegranate Blueberry Flavored Blend of 5 Juices,’ as printed on the
 27 label featured in the Complaint. . . . [T]he Court notes that Exhibit B to the
 28 Complaint, a depiction of Minute Maid’s website, shows that Coca Cola does – at
 least on occasion – refer to the product as ‘Pomegranate Blueberry’ without
 including the phrase “Flavored Blend of 5 Juices[.]” Otero Order at 2, n.1.

1 Act claim, finding that the claim does not inherently require interpretation of
2 *technical* FDA regulations. *Id.*, at pp. 6-7. “Put another way, Pom could establish
3 that Welch’s label is misleading even if the FDA regulations set mandatory
4 standards for when a beverage may include an image of fruit on its label.” *Id.*, at 7.

5 In response to Pom Wonderful’s document Requests, TCCC has pointed to
6 language in the Otero Order stating that the Lanham Act claim “may be construed as
7 impermissibly challenging the FDA’s regulations regarding an acceptable ‘common
8 or usual name’ and appropriate labeling for a multiple-juice beverage.” Otero
9 Order, at 6. With that language, the Otero Order simply noted that Pom
10 Wonderful’s Lanham Act claim was subject to dismissal *to the extent it could be*
11 *construed* to challenge these specific FDA regulations. Pom Wonderful agrees that
12 the Otero Order precludes its Lanham Act claim if it sought to challenge these FDA
13 regulations, which Pom Wonderful’s claims do not. In misinterpreting the Otero
14 Order as dismissing all claims against the product’s naming, labeling, and
15 packaging, TCCC ignores this language and the language that defined the precise
16 scope of preclusion: “only to the extent it challenges the Juice’s formal name and
17 labeling in areas for which the FDA has promulgated regulations implementing the
18 FFDCA.” Otero Order at 7. Unhappy with this language, TCCC seeks to rewrite
19 the Otero Order as a broad dismissal. It cannot do so. The Otero Order’s text,
20 denying the majority of TCCC’s motion to dismiss the Lanham Act claim, controls.

21 Accordingly, TCCC’s naming, labeling, and packaging documents are
22 relevant to Pom’s Lanham Act claim against the naming, labeling, and packaging of
23 the Pomegranate Blueberry Product.

1 **2. Judge Otero's Order Permitted Pom Wonderful's State Law**
 2 **Claims Under Cal. Bus. & Prof. Code §§ 17200 and 17500 To**
 3 **Proceed Against The Pomegranate Blueberry Product's Naming,**
 4 **Labeling, and Packaging.**

5 Judge Otero's Order permitted Pom Wonderful's state law claims to the
 6 extent they impose obligations "identical" to the FFDCA and its implementing
 7 regulations:

8 Pom's state law claims for false advertising under California
 9 Business & Professions Code § 17500 and statutory unfair
 10 competition under California Business & Professions Code §
 11 17200 **are preempted to the extent they seek to impose any**
 12 **obligations that are 'not identical to' the sections of the**
 FFDCA, including the FDA's implementing regulations,
 referenced in Section 40A of the FFDCA or 21 U.S.C. § 343-1,
 the only relevant sections of which appear to be Section 343(f)
 and 343(i).

13 Otero Order, at 11 (emphasis added). Accordingly, Pom Wonderful's state law
 14 claims were not dismissed insofar as they are "identical" to the FFDCA and its
 15 implementing regulation. See Otero Order at 11; see also In re Farm Raised Salmon
 16 Cases, 42 Cal. 4th 1077, 1094-95 (2008) (No preemption of Section 17200 claim
 17 predicated on violation of state law claims identical to FFDCA provisions). The
 18 Otero Order's plain terms provide that Pom Wonderful's state law claims may
 19 directly attack the naming and labeling of the Pomegranate Blueberry Product, so
 20 long as they do not seek to impose obligations which exceed those imposed by the
 21 FFDCA and its implementing regulations.

22 Consistent with the Otero Order, Pom Wonderful's state law claims for false
 23 advertising under Sections 17200 and 17500 seek to impose obligations identical to
 24 21 U.S.C. § 343(a) (Section 403 of the FFDCA), which provides that a food is
 25 misbranded if "its labeling is false or misleading in any particular." Pom
 26 Wonderful's state law claims are based on its allegations that TCCC's Pomegranate
 27 Blueberry Product utilizes false or misleading marketing, advertising, naming,
 28 labeling, and packaging. See Complaint, ¶ 22. The product's naming, labeling, and

1 packaging, taken as a whole, mislead consumers into believing that it is primarily
 2 composed of pomegranate and blueberry juice, when it is in fact primarily
 3 composed of cheap apple and grape juice. *Id.*, ¶¶ 22-23. Because the FFDCA,
 4 through Section 343(a), imposes liability for labels that are “false or misleading,”
 5 Pom Wonderful’s state law claims may, and do, assert identical claims against the
 6 Pomegranate Blueberry Product’s naming, labeling, and packaging.

7 Not only does the Otero Order permit this, but the express preemption
 8 provision that the Otero Order cited as a basis for its ruling – Section 343-1 –
 9 notably applies FFDCA express preemption to virtually every provision of Section
 10 343 *except* section 343(a). *See* 21 U.S.C. § 343-1.⁶ Congress has specifically stated
 11 its intent that “[t]he [NLEA] shall not be construed to preempt any provision of
 12 State law, unless such provision is expressly preempted under Section 403A [21
 13 U.S.C. § 343-1] of the Federal Food, Drug, and Cosmetic Act.” Pub. L. No. 101-
 14 535, § 6(c), 104 Stat. 2535, 2364 (1990) (21 U.S.C. § 343-1 note).

15 Moreover, in addressing parallel preemption issues, and after considering the
 16 Otero Order, Judge Matz recently rejected the argument that Pom Wonderful’s state
 17 law claims are preempted by the FFDCA. *See* Matz Order, at pp. 7-8 (Beck Decl.,
 18 Exh. H); *see also Wyeth v. Levine*, 129 S.Ct. 1187, 1198-1200 (2009) (limiting
 19 scope of FFDCA preemption).

20 Further mooted any contention that its state law claims impose obligations
 21 “not identical” to the FFDCA, Pom Wonderful has moved for leave to file its
 22 [Proposed] First Amended Complaint, which, albeit not required to do so, expressly

23 ⁶ The Otero Order appears to assume that Pom Wonderful’s state law claims
 24 seek to impose obligations similar to what is set forth in 21 U.S.C. §§ 343(f) and (i),
 25 which address the prominence of the information on the label (Section 343(f)) and
 26 the common name used on the label (Section 343(i)). However, Pom Wonderful’s
 27 state law claims are based on the fact that the label is false and misleading, thereby
 28 imposing obligations identical to 21 U.S.C. § 343(a), rather than attempting to
 impose obligations similar to 21 U.S.C. §§ 343(f) and (i).

1 alleges as a predicate for its Section 17200 claim that TCCC has violated
 2 California's Sherman Food, Drug, and Cosmetic Law, Health & Safe. Code §
 3 109875 *et seq.* (the Sherman Law).⁷ The motion for leave is unopposed. Section
 4 110660 of the Sherman Law imposes obligations identical to 21 U.S.C. § 343(a) of
 5 the FFDCA, providing that "[a]ny food is misbranded if its labeling is false or
 6 misleading in any particular." The Sherman Law incorporates "[a]ll food labeling
 7 regulations and any amendments to those regulations adopted pursuant to the
 8 FDCA" as "the food labeling regulations of this state." Health & Safe. Code §
 9 110100, subd. (a). Because these provisions of the Sherman Law are *identical* to the
 10 FFDCA and its implementing regulations, an unfair competition claim based upon
 11 them is *per se* not preempted. See Otero Order at 11; In re Farm Raised Salmon
 12 Cases, 42 Cal. 4th 1077, 1098 (2008) (permitting unfair competition claim based on
 13 Sherman Law violation because "while allowing private remedies based on
 14 violations of state laws identical to the FDCA may arguably result in actions that the
 15 FDA itself might not have pursued, Congress appears to have made a conscious
 16 choice not to preclude such actions."). The Section 17200 claim pled by Pom
 17 Wonderful's original Complaint also encompasses TCCC's Sherman Law violation,
 18 but the [Proposed] First Amended Complaint alleges the point expressly. Pursuant
 19 to its Sherman Law violation predicate, Pom Wonderful's Section 17200 claim is
 20 not preempted against the Pomegranate Blueberry Product's naming, labeling, and
 21 packaging.

22 Pom Wonderful's state law claims against the accused product's naming,
 23 labeling and packaging have not been dismissed, because those claims are identical
 24 to section 343(a) of the FFDCA, as well as its Sherman Law equivalent, Cal. Health
 25 & Safe. Code § 110660. Pom Wonderful is thus entitled to the production of the
 26 requested documents, as they go to the heart of Pom Wonderful's claims. Further,

27 ⁷ A copy of the [Proposed] First Amended Complaint is attached as Exhibit D
 28 to the Beck Declaration.

1 they are clearly reasonably calculated to lead to the discovery of admissible
2 evidence regarding its claims.

3 **3. TCCC's Interpretation of the Otero Order's Ruling on Preemption**
4 **is Erroneous.**

5 TCCC has nonetheless contended that Pom Wonderful's state law claims
6 were preempted insofar as they are based on highly-specific FDA naming and
7 labeling regulations. The Otero Order held exactly the *opposite*, however: Pom
8 Wonderful's state law claims are not preempted to the extent they are *identical* to
9 the FFDCA and its implementing regulations. See Otero Order at 11. Under the
10 Otero Order's plain terms, Pom Wonderful may assert state law claims identical to
11 the FFDCA and its corresponding FDA regulations, whether general or highly-
12 specific, without any preemption applying.

13 TCCC's secondary argument is that Pom Wonderful's claims against its
14 naming, labeling and packaging are precluded because TCCC's label complies with
15 all applicable, specific, federal labeling regulations. TCCC maintains that it cannot
16 be held liable under the *general* provisions of Section 343(a) when its labeling,
17 naming and packaging complies with more *specific* federal regulations for the
18 naming and labeling of juices. Based on this "safe harbor" defense, TCCC asserts
19 that Pom Wonderful's state law claims have been dismissed.⁸ The "safe harbor"
20 argument fails for multiple independent reasons.

21 *First*, the Otero Order did not decide the safe harbor defense issue. Instead,
22 Judge Otero explicitly declined to address TCCC's safe harbor argument. See Otero
23 Order, at 13-14. TCCC therefore cannot contend that the Otero Order decided the
24 safe harbor defense against Pom Wonderful.

25
26
27 ⁸ The "safe harbor" defense was articulated by the California Supreme Court in
28 Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co., 973 P.2d 527, 541
(1999); see also McKell v. Wash. Mut., Inc., 142 Cal. App. 4th 1457, 1474 (2006).

1 **Second**, TCCC has cited no legal authority holding that compliance with the
 2 FDA's specific naming and labeling regulations – sections 343(f) and (i) – exempts
 3 a product label from further liability under the broad misbranding provision of 21
 4 U.S.C. § 343(a). In fact, Congress held the opposite by preempting claims under
 5 343(f) and (i), but not 343(a), when in 1990 it enacted 21 U.S.C. § 343-1 as part of
 6 the Nutrition and Education Labeling Act (NLEA). And as Congress further stated,
 7 “[t]he [NLEA] shall not be construed to preempt any provision of State law, unless
 8 such provision is expressly preempted under Section 403A [21 U.S.C. § 343-1] of
 9 the Federal Food, Drug, and Cosmetic Act.” Pub. L. No. 101-535, § 6(c), 104 Stat.
 10 2535, 2364 (1990) (21 U.S.C. § 343-1 note).

11 There are many potential ways in which a label may mislead consumers, and
 12 there is no indication that Congress intended for specific FDA regulations to
 13 preempt the general misbranding liability imposed by Section 343(a) for misleading
 14 or deceptive labels. When Congress has wanted to create a safe harbor in the
 15 FFDCA, it has done so expressly. See Pearson v. Shalala, 130 F. Supp. 2d 105,
 16 107-108 (D.D.C. 2001) (Congress amended the FFDCA to create “safe harbor” for
 17 dietary supplements, exempting them from FDA drug regulations); see also Farm
 18 Raised Salmon, 42 Cal. 4th at 1092 (“Congress knows how to write a preemption
 19 clause.”). With respect to the naming and labeling requirements for juices,
 20 Congress did not create such a statutory safe harbor premised on compliance with
 21 specific FDA regulations. Indeed, the FDA would be robbed of its general authority
 22 to seek redress for misbranding, pursuant to 21 U.S.C. § 343(a), if bare compliance
 23 with the FDA's specific naming and labeling regulations precludes any more
 24 general liability for labels under the FFDCA (such as, for example, misleading label
 25 images).

26 **Third**, TCCC improperly presumes that it has complied with all relevant
 27 FFDCA provisions and regulations. TCCC's Answer pleads “safe harbor” as its
 28 Thirtieth Affirmative Defense, alleging that “Plaintiff's state law claims are barred

by California's safe harbor doctrine because TCCC's alleged actions, at all relevant times and places, were in compliance with applicable law." Answer, at 10. But TCCC has not proven such alleged compliance. The FDA has never determined that TCCC's accused Pomegranate Blueberry Product complies with all of the FFDCA provisions and corresponding FDA regulations regarding naming and labeling. To the extent a "safe harbor defense" even arguably applies to Pom Wonderful's California law claims, TCCC bears the affirmative burden of proving its compliance with all applicable FFDCA provisions and their implementing regulations. See, e.g., Bourgi v. West Covina Motors, Inc., 166 Cal. App. 45h 1549, 1660 (2008) (jury must determine whether defendant complied with Vehicle Code, establishing safe harbor defense against Consumers Legal Remedies Act claim). The Federal Rules, which permit broad discovery, certainly entitle Pom Wonderful to discover evidence rebutting TCCC's intended assertion of its Thirtieth Affirmative Defense.

4. Documents Relating to the Naming, Labeling, and Packaging of the Pomegranate Blueberry Product are Relevant to Pom Wonderful's Claims that the Product's Marketing and Advertising is False and Misleading.

Assuming, *arguendo*, that TCCC's interpretation of the Otero Order was correct – which it is not – TCCC has conceded that Pom Wonderful's claims against the Pomegranate Blueberry Product's marketing and advertising remain in the case.⁹ Because of their manifest relevance to those claims, and the fact that requested documents are certainly reasonably calculated to lead to the discovery of admissible evidence, TCCC's naming, labeling, and packaging documents must be produced.

⁹ See, e.g., Beck Decl, Exh. F at p.2 (June 11, 2009 letter from Kristin S. Escalante, counsel for Coca Cola, to Daniel S. Silverman, counsel for Pom Wonderful) ("Logically, therefore, when the Court identified those aspects of Pom's Lanham Act claim that may proceed, the Court referred only to *advertising* and *marketing*." (emphasis original)).

1 To take an obvious example, TCCC's decision to name its product
2 "Pomegranate Blueberry" – rather than, say, "Apple Grape," which are the
3 predominant ingredients – evidences TCCC's intention to focus consumers on the
4 pomegranate and blueberry juice in the product, while downplaying the cheaper
5 juices it primarily contains. FDA regulations in no way required TCCC to name its
6 product "Pomegranate Blueberry." See Beck Decl, Exh. E (color copy of the
7 product's label). TCCC selected that particular name purely because of its
8 marketing considerations, considerations which are directly relevant to Pom
9 Wonderful's claims that TCCC's marketing misleads consumers into believing that
10 its product primarily contains pomegranate and blueberry juice. Similarly, TCCC
11 decided to prominently display a pomegranate and blueberries on the product's label
12 because it wanted to attract consumers to these juice components. Id. The FDA did
13 not make TCCC place those pomegranate or blueberry images on the label; TCCC's
14 marketing strategy placed them there. In fact, the name and label itself constitute
15 core aspects of the product's marketing and advertising. They are designed to sell
16 the product, not simply to avoid FDA actions.

17 From the start, TCCC's marketing and advertising considerations have
18 determined the naming, labeling, and packaging of its Pomegranate Blueberry
19 Product. There was no "marketing free" development of that name, label, or
20 packaging. They inherently constitute marketing and advertising. The exact same
21 marketing considerations that drove TCCC to develop the product's name, label,
22 and packaging with a "Pomegranate" focus were equally involved in TCCC's later
23 decisions to market and advertise the product. They form part of the same
24 continuous effort to market the product to consumers, rather than constituting
25 distinct and unrelated "pre-advertising" and "post-advertising" phases of product
26 design.

27 TCCC's position is particularly indefensible because the legal standard for
28 discoverability is simply whether a document is "reasonably calculated to lead to the

discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). It is beyond reasonable dispute that Pom Wonderful’s Requests for documents relating to the naming of the Pomegranate Blueberry Product are likely to lead to admissible evidence regarding its claims that TCCC has engaged in false or misleading advertising. For example, TCCC refers to its product as “Pomegranate Blueberry” on its Internet website, without any “flavored” or “blend” qualifications required by FDA regulations. See Beck Decl., Exh. G. Judge Otero’s Order recognized this fact. See Otero Order at 2, n.1 (“TCCC does – at least on occasion – refer to the product as ‘Pomegranate Blueberry’ without including the phrase ‘Flavored Blend of 5 Juices’”). The reason why TCCC chose to name its product “Pomegranate Blueberry” in the first place is patently probative of the reason why TCCC later chose to market the product by that same name – without any FDA qualifications – on its website. Pom Wonderful is entitled to the production of documents that will show how TCCC, from the start, intended to exploit the Pomegranate juice market by naming its product “Pomegranate Blueberry,” rather than myriad other options.

In response to Pom Wonderful’s Requests, TCCC has offered to unilaterally determine which specific naming, labeling, and packaging documents TCCC believes are discoverable pursuant to Pom Wonderful’s marketing and advertising claims, and then produce only those documents. See Beck Decl., Exh. F, at p.4 (June 11, 2009 letter from Kristin S. Escalante, counsel for TCCC, to Daniel S. Silverman, counsel for Pom Wonderful). Exemplifying the inadequacy of that offer, TCCC contended during the parties’ meet and confer that the documents relating to its development of the product’s name, label, and packaging are all irrelevant because such development occurred prior to the product’s marketing and advertising. As pointed out above, that is absurd. From the beginning, TCCC’s marketing strategy determined the product’s naming, labeling, and packaging. In fact, the marketing department, likely working with a package design consultant, carefully crafted the label to maximize the likelihood that consumers would be

1 misled to believe the product primarily or exclusively contained pomegranate juice
2 and blueberry juice.

3 Finally, ironically, TCCC demanded during the meet and confer that Pom
4 Wonderful produce its own naming, labeling, and packaging documents, despite the
5 fact they are not at issue in the case. Nonetheless, in the spirit of cooperation, and
6 recognizing the broad scope of discovery, Pom Wonderful has agreed to produce
7 those documents, which are irrelevant in this case. TCCC should, in turn, be
8 ordered to make a complete production of its own documents, which lie at the core
9 of this action. It would be an absurd result if TCCC were allowed to have Pom
10 Wonderful's naming, labeling, and packaging documents, while TCCC did not have
11 to produce similar documents.

12 **C. TCCC's Position Re: Its Objections To Producing Its Naming, Labeling,**
13 **and Packaging Documents**

14 Pom's motion can be boiled down to a simple question: did the Court rule, as
15 its Order repeatedly states, that Pom may proceed only with its claims that defendant
16 advertised and marketed the juice blend product in a manner that was deceptive and
17 misleading and not on its additional claims that the product name and the product
18 label, both of which admittedly comply with specific FDA regulations, were
19 misleading to consumers? TCCC submits that the naming and labeling claims have
20 been dismissed from the case, and that discovery should therefore focus on the
21 issues remaining in this litigation. In addition, Judge Otero will have the
22 opportunity to address Pom's incorrect interpretation of the Court's Order in
23 connection with TCCC's expected Motion to Dismiss the Amended Complaint.
24 Therefore, no discovery inconsistent with the Court's Order should proceed at this
25 time.

1. Judge Otero Dismissed Pom's Lanham Act and State Law Claims Based On The Name and Label of The Minute Maid Pomegranate Blueberry Flavored Blend of 5 Juices Product.

In December 2008, TCCC moved to dismiss Pom's Complaint. TCCC argued that Pom's Lanham Act claims were barred both because TCCC had complied fully with the FDA's detailed regulations regarding product name and labeling, and because Pom's claims would require the Court to interpret and apply the FDA's regulations. With regard to Pom's state law claims, TCCC argued that those claims were expressly and impliedly preempted, as well as precluded by California's "safe harbor" doctrine.

On February 10, 2009, the Court issued a ruling granting in part and denying in part TCCC's Motion to Dismiss ("Order").

Pom's Lanham Act Claim: The Court agreed with TCCC that Pom could not maintain a claim regarding the product's name and labeling because Pom's claim would require the Court to interpret and apply the FDA's regulations regarding the "common or usual name" and appropriate labeling for a multiple-juice beverage. As the Court stated, "Pom's Lanham Act claim, with regard to the Juice's name and labeling, may be construed as impermissibly challenging the FDA's regulations regarding an acceptable 'common or usual name' and appropriate labeling for a multiple-juice beverage. *See Rita Medical Sys, Inc.*, 2006 WL 202383283, at *3. Moreover, if Pom's Lanham Act claim were to focus on areas covered by the FFDCA and the FDA-implementing regulations, the Court would be required to interpret and apply FDA regulations as to the labeling of the Juice, which the FDA has not considered or approved. [citations]. The Court is unable to perform such an interpretation and application of the FDA's regulations as applied to the Juice, because it would 'usurp[] the FDA's discretionary role in the application and interpretation of its regulations.' *See Summit Tech, Inc.*, 922 F.Supp. at 306 (internal citation omitted)." Order at 6.

1 The Court then clarified that Pom could proceed in this matter only on its
 2 claims relating to those aspects of TCCC's "advertising" and "marketing" which
 3 went "beyond" the product's name and label. As the Order states: "Because the
 4 Court, in contexts beyond the Juice's formal name and labeling areas for which
 5 there are relevant FDA regulations, will not be required to interpret FDA
 6 regulations, Pom's Lanham Act claim can proceed *to the extent* it seeks to redress
 7 TCCC's marketing and advertising in such areas." Order at 7 (emphases added). In
 8 other words, the Court reserved the possibility Pom could show that "Coca[-]Cola
 9 has *otherwise* advertised and marketed its product in a misleading manner that leads
 10 consumers to believe that the primary ingredients are pomegranate and blueberry."
 11 *Id.* (emphases added).

12 Pom argues to the contrary, relying upon a snippet lifted from Judge Otero's
 13 ruling that states "the Court is largely unpersuaded by Coca-Cola's argument, as
 14 Coca-Cola's argument does not address the majority of Pom's Lanham Act claims."
 15 Order at 7. This statement, when read in its full context, reflects the Court's view
 16 that the "majority" of Pom's Lanham Act claims related to the "advertising" and
 17 "marketing" of the product (as opposed to the formal name or label), and in no way
 18 detracts from the Court's lengthy, reasoned ruling dismissing the "naming" and
 19 "labeling" claims from the case. At the time the Court made its ruling on the motion
 20 to dismiss, the Court could not have known that, as a matter of fact, Pom had no
 21 factual basis for its allegations about advertising and marketing deception that were
 22 independent of its naming and labeling claims, and that the claims that remained in
 23 the case were a null set. The absence of such statements may explain why Pom
 24 continues to assert that its claims regarding the "name" and "label" of the product
 25 are still at issue in this case, instead of focusing on the "majority" of its case – the
 26 alleged advertising and marketing statements of defendant.

27 **Pom's False Advertising and Unfair Competition Claims:** With regard to
 28 Pom's state law claims, the Court maintained a similar distinction between the

1 product's name and labeling, on the one hand, and its marketing and advertising, on
2 the other hand. Pursuant to the express preemption provision for National Uniform
3 Nutrition Labeling, section 343-1 of title 21 of the U.S. Code, the Court found that
4 "to the extent [Pom's state law claims] seek to impose obligations 'not identical to'"
5 those obligations imposed by applicable FFDCA provisions and FDA regulations,
6 those claims were expressly preempted. Order at 11 (quoting 21 U.S.C. § 343-1).
7 The Court concluded that Pom's theory of liability – that consumers were misled by
8 the Product name and label to conclude that the juice consisted primarily of those
9 pomegranate and blueberry juice – applied a standard different from applicable
10 federal naming and labeling regulations, with which TCCC complied.

11 As the Court stated, "[g]iven the allegations in the Complaint regarding
12 Coca[-]Cola's deceptive 'packaging' of the Juice, which is a multiple-juice beverage
13 containing apple juice, grape juice, pomegranate juice, and blueberry juice, it
14 appears as though Pom, through its state law claims, may attempt to impose
15 requirements differing from those naming and labeling requirements for multiple-
16 juice beverages in the FFDCA and the FDA's implementing regulations." Order at
17 10. Therefore, the Court ruled that the conflicting state law claims were expressly
18 preempted and could not proceed; *id.* at 11 (stating that "Pom's state law claims . . .
19 are preempted to the extent they seek to impose any obligations that are 'not
20 identical to' the sections of the FFDCA, including the FDA's implementing
21 regulations."). As with Pom's Lanham Act claims, the Court allowed those aspects
22 of Pom's claim that would not seek to impose different standards for labeling and
23 naming — logically, its advertising and marketing allegations — to proceed.

1 **2. Pom Has Not Asserted Any Claims Regarding The Product's**
2 **Name or Labeling Other than Those Already Dismissed from**
3 **The Case.**

4 Pom argues that it is entitled to discovery on the product name and label
5 because it wishes to assert claims about the name and label that were not dismissed
6 from the case. However, no such allegations are contained in the complaint, which
7 likely explains why the Court dismissed these allegations from the case in their
8 entirety, leaving Pom to pursue its hypothetical "advertising and marketing" claims
9 only.

10 In apparent recognition of this fact, Pom's brief argues that it has asserted
11 name and labeling claims, but then cites to statements made on the Minute Maid
12 Internet website. TCCC, however, has already agreed to produce documents related
13 to the website, and any statements made on the website regarding the juice blend
14 product. The only documents TCCC has declined to produce are those responsive to
15 discovery requests served by Pom that are directed specifically at the name of the
16 product and its FDA-compliant labeling.

17 Pom next argues that there are aspects of the product label that are not
18 regulated by the FDA, including images of fruit on the product label. Again, Pom's
19 complaint does not contain any allegations about such images. In addition, as
20 addressed in the motion to dismiss papers filed with the Court, the FDA discussed in
21 its preamble to the final juice labeling regulation an example where "a 100 percent
22 juice product consisting of apple, grape, and raspberry juices, in which the raspberry
23 juice provides the characterizing flavor" and the bottle depicts a vignette containing
24 only raspberries. 58 Fed. Reg. 2897 at 2921, ¶52. The FDA concluded that "the
25 vignette [depicting solely raspberries] *would not be misleading* if the beverage were
26 named 'raspberry flavored fruit juice blend.'" *Id.* (emphasis added). The Minute
27 Maid label at issue here – "Pomegranate Blueberry Flavored Blend of 5 Juices" –
28 contains a common name that is substantively the same as the compliant example

1 provided by the FDA. And although the vignette on the label would have been
 2 compliant had it illustrated only pomegranates and blueberries, it actually shows *all*
 3 *five of the fruits* in the juice beverage. *See* Complaint, Exh. A. Thus, Pom is simply
 4 mistaken when it asserts that the pictures of fruit on the label of a juice blend is not
 5 regulated by the FDA. Such vignettes are within the scope of the FDA's
 6 regulations, and therefore Pom's claims related thereto have been dismissed from
 7 this action.

8 Finally, Pom presents a dubious interpretation of an order issued in another
 9 case by Judge Matz – a case that Pom successfully argued to this Court should not
 10 be deemed a “related case” because it “involves transactions, happenings, and
 11 events which are clearly different from, and unrelated to, those involved in the
 12 [Welch's case].” *See* Pom's Opposition to Notice of Related Case [Docket No. 24].
 13 Pom also represented to the Court that the cases had “no meaningful overlap
 14 between the facts at issue” *Id.* Thus, by Pom's own admission, Judge Matz's
 15 ruling in the Welch's case has no bearing on this action.

16 In any event, the plain language of Judge Matz's order reveals that he neither
 17 undertook nor criticized the analysis conducted by Judge Otero in this case. Rather,
 18 Judge Matz postponed to another day the issues of preclusion and preemption,
 19 finding on the record before him that these issues were more appropriately
 20 determined on a motion for summary judgment.

21 3. Pom's State Law Claims Regarding The Formal Name and 22 Labeling of The Product Were Dismissed.

23 Pom next argues that the Court's ruling with respect to its state law claims
 24 applies only to those claims that are “not identical to” the sections of the FFDCA
 25 that regulate the name and label of juice products, from which Pom then implies that
 26 the Court, therefore, “permitted” Pom's state law claims to proceed “insofar as they
 27 are identical to the FFDCA and its implementing regulation [sic].” The Court,
 28 however, did not permit Pom to continue with claims identical to the FFDCA

1 *because Pom did not assert any such claims*, either in its complaint or its opposition
 2 brief to defendant's Motion to Dismiss. This explains why the Court stated in its
 3 ruling that Pom could pursue its state law claims solely with respect to claims
 4 related to defendant's advertising and marketing of the juice product, and not with
 5 respect to the name or labeling. Pom's improper attempt to rewrite Judge Otero's
 6 ruling in the guise of a discovery dispute should be rejected.

7 Pom next argues that it should be permitted to pursue new state law claims
 8 that are "identical to" the requirements of the FFDCA pursuant to California's
 9 Sherman Law. These claims are not presently in the complaint, and Pom has
 10 requested leave to file an amended complaint to include them. Once the Court
 11 grants that request, TCCC will move to dismiss the claims, which are legally
 12 deficient on several grounds. TCCC submits, however, that this decision is for the
 13 District Court to make on TCCC's expected Motion to Dismiss the Amended
 14 Complaint, rather than one to be made in the context of this discovery motion. Pom
 15 cannot use its request for leave to amend the complaint, filed nearly four months
 16 after the pleadings were settled in this case, as a lever to force open discovery into
 17 areas that the Court has already dismissed from the action.

18 **4. Pom's Attempt To Define "Advertising and Marketing" As**
 19 **Including the Name and Label of the Product Is A**
 20 **Transparent End-Run Around The Court's Ruling.**

21 Pom next argues that even if TCCC is correctly reading Judge Otero's Order,
 22 Pom is nonetheless entitled to take discovery on the name and label of the juice
 23 product because both constitute "advertising" and "marketing" for the product. In
 24 this way, Pom seeks to circumvent the Court's Order by defining advertising and
 25 marketing as including the dismissed claims regarding the name and labeling of the
 26 product. This is pure sophistry. If accepted, Pom's argument that the naming and
 27 labeling of a beverage is merely an aspect of its advertising and marketing would
 28 render the Court's Order purely advisory. It would also eviscerate the entire body of

1 law that has developed around FFDCA preclusion and preemption in the area of
2 product naming and labeling. Such a reading of the law and the Order is neither
3 warranted nor appropriate.

4 Particularly revealing is that, in making this argument, Pom references its
5 allegations regarding the portion of the product name "Pomegranate Blueberry," and
6 the vignette of fruits with juices represented in the product, both of which are
7 specifically subject to detailed FDA regulations. Pom cannot evade the Court's
8 Order by redefining "advertising and marketing" to include "naming and labeling"
9 claims that were expressly dismissed by the Court.

10 TCCC has agreed to produce all documents that constitute, set forth, describe
11 or refer to its advertising and marketing of the juice product. This is ample for Pom
12 to pursue those claims that remain in the case after the Court's ruling. Pom may not,
13 however, redefine the words "advertising" and "marketing" in a way that sweeps in
14 that which the Court has expressly excluded.

15 **5. TCCC's Discovery Requests Are Not At Issue Here.**

16 Pom's final argument is that TCCC sought documents regarding Pom's name,
17 label and packaging of its products, and therefore it should be entitled to the same
18 discovery as a matter of reciprocity. The discovery sought by defendant, however,
19 was for purposes completely different than those professed here by plaintiff, and
20 therefore Pom's comparison is entirely irrelevant and improper. TCCC seeks
21 information relevant to its affirmative defenses, and not for purposes of prosecuting
22 a precluded or preempted claim. In any event, Pom has apparently recognized the
23 legitimacy of TCCC's requests because it has agreed to produce the requested
24 documentation.

III. THE DISPUTED DOCUMENT REQUESTS
AND TCCC'S RESPONSES

Following below are Pom Wonderful's Document Requests Nos. 13-18, 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, and 53, along with TCCC's written response to each Request.

REQUEST FOR PRODUCTION NO. 13:

All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to the packaging of the POMEGRANATE BLUEBERRY JUICE PRODUCT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 13:

Defendant incorporates its general objections as though set forth here in full. Defendant further objects to the request as vague and ambiguous. Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiffs claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case. Subject to and without waiving the foregoing objections, Defendant responds as follows: Defendant will produce copies of the packaging for the BEVERAGE used in the United States.

REQUEST FOR PRODUCTION NO. 14:

All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to the labeling of the POMEGRANATE BLUEBERRY JUICE PRODUCT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 14:

Defendant incorporates its general objections as though set forth here in full. Defendant further objects to the request as vague and ambiguous. Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiffs claims that are based on the naming, labeling and packaging of the BEVERAGE have been

1 dismissed from this case. Subject to and without waiving the foregoing objections,
2 Defendant responds as follows: Defendant will produce a copy of the labeling for
3 the BEVERAGE used in the United States.

4 **REQUEST FOR PRODUCTION NO. 15:**

5 All DOCUMENTS, including COMMUNICATIONS, that REFER or
6 RELATE to the design of the label for the POMEGRANATE BLUEBERRY JUICE
7 PRODUCT.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

9 Defendant incorporates its general objections as though set forth here in full.
10 Defendant further objects to the request as vague and ambiguous. Defendant further
11 objects to this request as not reasonably likely to lead to the discovery of admissible
12 evidence in this case because the Court has ruled that all of Plaintiffs claims that are
13 based on the naming, labeling and packaging of the BEVERAGE have been
14 dismissed from this case. Subject to and without waiving the foregoing objections,
15 Defendant responds as follows: Defendant will not produce documents in response
16 to this request.

17 **REQUEST FOR PRODUCTION NO. 16:**

18 All DOCUMENTS sufficient to identify each of YOUR employees who
19 worked on the design of the label for the POMEGRANATE BLUEBERRY JUICE
20 PRODUCT.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

22 Defendant incorporates its general objections as though set forth here in full.
23 Defendant further objects to the request as vague and ambiguous. Defendant further
24 objects to this request as not reasonably likely to lead to the discovery of admissible
25 evidence in this case because the Court has ruled that all of Plaintiffs claims that are
26 based on the naming, labeling and packaging of the BEVERAGE have been
27 dismissed from this case. Subject to and without waiving the foregoing objections,
28

1 Defendant responds as follows: Defendant will not produce documents in response
2 to this request.

3 **REQUEST FOR PRODUCTION NO. 17:**

4 All DOCUMENTS, including COMMUNICATIONS, that REFER or
5 RELATE to the images depicted on the label for the POMEGRANATE
6 BLUEBERRY JUICE PRODUCT.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

8 Defendant incorporates its general objections as though set forth here in full.
9 Defendant further objects to the request as vague and ambiguous. Defendant further
10 objects to this request as not reasonably likely to lead to the discovery of admissible
11 evidence in this case because the Court has ruled that all of Plaintiffs claims that are
12 based on the naming, labeling and packaging of the BEVERAGE have been
13 dismissed from this case. Subject to and without waiving the foregoing objections,
14 Defendant responds as follows: Defendant will produce a copy of the labeling for
15 the BEVERAGE used in the United States.

16 **REQUEST FOR PRODUCTION NO. 18:**

17 All DOCUMENTS, including COMMUNICATIONS, that REFER or
18 RELATE to YOUR use of the phrase "Enhanced Juice" on the label for the
19 POMEGRANATE BLUEBERRY JUICE PRODUCT.

20 **RESPONSE TO REQUEST FOR PRODUCTION NO. 18:**

21 Defendant incorporates its general objections as though set forth here in full.
22 Defendant further objects to the request as vague and ambiguous. Defendant further
23 objects to this request as not reasonably likely to lead to the discovery of admissible
24 evidence in this case because the Court has ruled that all of Plaintiffs claims that are
25 based on the naming, labeling and packaging of the BEVERAGE have been
26 dismissed from this case. Subject to and without waiving the foregoing objections,
27 Defendant responds as follows: Defendant will produce a copy of the labeling for
28 the BEVERAGE used in the United States.

REQUEST FOR PRODUCTION NO. 20:

All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to YOUR use of the phrase "100% Fruit Juice Blend" on the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

Defendant incorporates its general objections as though set forth here in full. Defendant further objects to the request as vague and ambiguous. Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiff's claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case. Subject to and without waiving the foregoing objections, Defendant responds as follows: Defendant will produce a copy of the labeling for the BEVERAGE used in the United States.

REQUEST FOR PRODUCTION NO. 22:

All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to YOUR use of the phrase "Flavored Blend of 5 Juices" on the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 22:

Defendant incorporates its general objections as though set forth here in full. Defendant further objects to the request as vague and ambiguous. Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiff's claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case. Subject to and without waiving the foregoing objections, Defendant responds as follows: Defendant will produce a copy of the labeling for the BEVERAGE used in the United States.

REQUEST FOR PRODUCTION NO. 24:

1 All DOCUMENTS, including COMMUNICATIONS, that REFER or
2 RELATE to YOUR use of the phrase "Pomegranate Blueberry" on the label of the
3 POMEGRANATE BLUEBERRY JUICE PRODUCT.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

5 Defendant incorporates its general objections as though set forth here in full.
6 Defendant further objects to the request as vague and ambiguous. Defendant further
7 objects to this request as not reasonably likely to lead to the discovery of admissible
8 evidence in this case because the Court has ruled that all of Plaintiff's claims that are
9 based on the naming, labeling and packaging of the BEVERAGE have been
10 dismissed from this case. Subject to and without waiving the foregoing objections,
11 Defendant responds as follows: Defendant will produce a copy of the labeling for
12 the BEVERAGE used in the United States.

13 **REQUEST FOR PRODUCTION NO. 26:**

14 All DOCUMENTS, including COMMUNICATIONS, that REFER or
15 RELATE to actual consumer confusion in connection with the label for the
16 POMEGRANATE BLUEBERRY JUICE PRODUCT.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

18 Defendant incorporates its general objections as though set forth here in full.
19 Defendant also objects to the request as vague and ambiguous. Defendant further
20 objects to this request as not reasonably likely to lead to the discovery of admissible
21 evidence in this case because the Court has ruled that all of Plaintiff's claims that are
22 based on the naming, labeling and packaging of the BEVERAGE have been
23 dismissed from this case. Subject to and without waiving the foregoing objections,
24 Defendant responds as follows: Defendant will not produce any documents in
25 response to this request.
26
27
28

1 **REQUEST FOR PRODUCTION NO. 27:**

2 All DOCUMENTS, including COMMUNICATIONS, that REFER or
3 RELATE to actual consumer confusion regarding the name of the
4 POMEGRANATE BLUEBERRY JUICE PRODUCT.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 27:**

6 Defendant incorporates its general objections as though set forth here in full.
7 Defendant also objects to the request as vague and ambiguous. Defendant further
8 objects to this request as not reasonably likely to lead to the discovery of admissible
9 evidence in this case because the Court has ruled that all of Plaintiff's claims that are
10 based on the naming, labeling and packaging of the BEVERAGE have been
11 dismissed from this case. Subject to and without waiving the foregoing objections,
12 Defendant responds as follows: Defendant will not produce any documents in
13 response to this request.

14 **REQUEST FOR PRODUCTION NO. 31:**

15 All DOCUMENTS, including COMMUNICATIONS, that REFER or
16 RELATE to the likelihood of, or potential for, consumer confusion in connection
17 with the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 31:**

19 Defendant incorporates its general objections as though set forth here in full.
20 Defendant further objects to the request as vague and ambiguous. Defendant further
21 objects to this request as not reasonably likely to lead to the discovery of admissible
22 evidence in this case because the Court has ruled that all of Plaintiff's claims that are
23 based on the naming, labeling and packaging of the BEVERAGE have been
24 dismissed from this case. Subject to and without waiving the foregoing objections,
25 Defendant responds as follows: Defendant will not produce documents in response
26 to this request.

1 **REQUEST FOR PRODUCTION NO. 34:**

2 ALL DOCUMENTS, including COMMUNICATIONS, that REFER or
3 RELATE to the likelihood of, or potential for, consumer confusion regarding the
4 name of the POMEGRANATE BLUEBERRY JUICE PRODUCT.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 34:**

6 Defendant incorporates its general objections as though set forth here in full.
7 Defendant further objects to the request as vague and ambiguous. Defendant further
8 objects to this request as not reasonably likely to lead to the discovery of admissible
9 evidence in this case because the Court has ruled that all of Plaintiffs claims that are
10 based on the naming, labeling and packaging of the BEVERAGE have been
11 dismissed from this case. Subject to and without waiving the foregoing objections,
12 Defendant responds as follows: Defendant will not produce documents in response
13 to this request.

14 **REQUEST FOR PRODUCTION NO. 36:**

15 ALL DOCUMENTS, including COMMUNICATIONS, that REFER or
16 RELATE to consumer comments, inquiries, criticisms, complaints, or questions
17 regarding the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 36:**

19 Defendant incorporates its general objections as though set forth here in full.
20 Defendant further objects to the request as vague, ambiguous, compound and
21 overbroad. Defendant further objects to this request as not reasonably likely to lead
22 to the discovery of admissible evidence in this case because the Court has ruled that
23 all of Plaintiff's claims that are based on the naming, labeling and packaging of the
24 BEVERAGE have been dismissed from this case. Subject to and without waiving
25 the foregoing objections, Defendant responds as follows: Defendant will not
26 produce documents in Response to this request.

REQUEST FOR PRODUCTION NO. 37:

All DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to competitor comments, inquiries, criticisms, complaints, or questions regarding the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 37:

Defendant incorporates its general objections as though set forth here in full. Defendant further objects to the request as vague, ambiguous and compound. Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiffs claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case. Further, this request is not reasonably calculated to lead to the discovery of admissible evidence because the comments, inquiries, criticisms, complaints or questions of competitors regarding the labeling for the BEVERAGE has no bearing upon Plaintiffs allegations in the complaint regarding alleged consumer confusion. Subject to and without waiving the foregoing objections, Defendant responds as follows: Defendant will not produce documents in response to this request.

REQUEST FOR PRODUCTION NO. 39:

ALL DOCUMENTS, including COMMUNICATIONS, that REFER or RELATE to any inquires or proceedings by any governmental body regarding the label for the POMEGRANATE BLUEBERRY JUICE PRODUCT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 39:

Defendant incorporates its general objections as though set forth here in full. Defendant further objects to the request as vague and ambiguous. Defendant further objects to this request as not reasonably likely to lead to the discovery of admissible evidence in this case because the Court has ruled that all of Plaintiff's claims that are based on the naming, labeling and packaging of the BEVERAGE have been dismissed from this case. Subject to and without waiving the foregoing objections,

1 Defendant responds as follows: Defendant has not located any such documents after
2 a conducting a reasonably diligent search.

3 **REQUEST FOR PRODUCTION NO. 40:**

4 ALL DOCUMENTS, including COMMUNICATIONS, that REFER or
5 RELATE to consumer comments, inquiries, criticisms, complaints, or questions
6 regarding the ingredients in the POMEGRANATE BLUEBERRY JUICE
7 PRODUCT.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 40:**

9 Defendant incorporates its general objections as though set forth here in full.
10 Defendant further objects to the request as vague, ambiguous, overbroad and
11 unintelligible. Defendant further objects to this request as not reasonably likely to
12 lead to the discovery of admissible evidence in this case because the complaint
13 contains allegations regarding the naming, labeling, marketing and advertising of the
14 BEVERAGE only. Subject to and without waiving the foregoing objections,
15 Defendant responds as follows: Defendant will produce all documents located after
16 a reasonable inquiry and diligent search that constitute, describe, or set forth
17 consumer comments, inquiries, criticisms, complaints, or questions about
18 advertising or marketing regarding the BEVERAGE's ingredients.

19 **REQUEST FOR PRODUCTION NO. 41:**

20 ALL DOCUMENTS, including COMMUNICATIONS, that REFER or
21 RELATE to competitor comments, inquiries, criticisms, complaints, or questions
22 regarding the ingredients in the POMEGRANATE BLUEBERRY JUICE
23 PRODUCT.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 41:**

25 Defendant incorporates its general objections as though set forth here in full.
26 Defendant further objects to the request as vague, ambiguous and compound.
27 Defendant further objects to this request as not reasonably likely to lead to the
28 discovery of admissible evidence in this case because the Court has ruled that all of

1 Plaintiffs claims that are based on the naming, labeling and packaging of the
 2 BEVERAGE have been dismissed from this case. Further, this request is not
 3 reasonably calculated to lead to the discovery of admissible evidence because the
 4 comments, inquiries, criticisms, complaints or questions of competitors regarding
 5 the ingredients contained in the BEVERAGE have no bearing upon Plaintiff's
 6 allegations in the complaint regarding alleged consumer confusion. Subject to and
 7 without waiving the foregoing objections, Defendant responds as follows:

8 Defendant will not produce documents in response to this request.

9 **REQUEST FOR PRODUCTION NO. 44:**

10 All DOCUMENTS, including COMMUNICATIONS, that REFER or
 11 RELATE to consumer comments, inquiries, criticisms, complaints, or questions
 12 regarding the name of the POMEGRANATE BLUEBERRY JUICE PRODUCT.

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 44:**

14 Defendant incorporates its general objections as though set forth here in full.
 15 Defendant further objects to the request as vague and ambiguous. Defendant further
 16 objects to this request as not reasonably likely to lead to the discovery of admissible
 17 evidence in this case because the Court has ruled that all of Plaintiff's claims that are
 18 based on the naming, labeling and packaging of the BEVERAGE have been
 19 dismissed from this case. Subject to and without waiving the foregoing objections,
 20 Defendant responds as follows: Defendant will not produce any documents in
 21 RESPONSE to this request.

22 **REQUEST FOR PRODUCTION NO. 45:**

23 All DOCUMENTS, including COMMUNICATIONS, that REFER or
 24 RELATE to competitor comments, inquiries, criticisms, complaints, or questions
 25 regarding the name of the POMEGRANATE BLUEBERRY JUICE PRODUCT.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 45:**

27 Defendant incorporates its general objections as though set forth here in full.
 28 Defendant further objects to the request as vague, ambiguous and compound.

1 Defendant further objects to this request as not reasonably likely to lead to the
2 discovery of admissible evidence in this case because the Court has ruled that all of
3 Plaintiff's claims that are based on the naming, labeling and packaging of the
4 BEVERAGE have been dismissed from this case. Further, this request is not
5 reasonably calculated to lead to the discovery of admissible evidence because the
6 comments, inquiries, criticisms, complaints or questions of competitors regarding
7 the name of the BEVERAGE have no bearing upon Plaintiff's allegations in the
8 complaint regarding alleged consumer confusion. Subject to and without waiving
9 the foregoing objections, Defendant responds as follows: Defendant will not
10 produce documents in response to this request.

11 **REQUEST FOR PRODUCTION NO. 53:**

12 All DOCUMENTS, including COMMUNICATIONS, that REFER or
13 RELATE to the naming of the POMEGRANATE BLUEBERRY JUICE
14 PRODUCT.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 53:**

16 Defendant incorporates its general objections as though set forth here in full.
17 Defendant further objects to the request as vague, ambiguous and overbroad.
18 Defendant further objects to this request as not reasonably likely to lead to the
19 discovery of admissible evidence in this case because the Court has ruled that all of
20 Plaintiff's claims that are based on the naming, labeling and packaging of the
21 BEVERAGE have been dismissed from this case. Subject to and without waiving
22 the foregoing objections, Defendant responds as follows: Defendant will not
23 produce documents in response to this request.

IV. CONCLUSIONS

A. Pom Wonderful's Conclusion

For all of the reasons discussed above, Pom Wonderful respectfully requests that the Court order TCCC to make a complete production of documents in response to Requests Nos. 13-18, 20, 22, 24, 26-27, 31, 34, 36, 37, 39, 40, 41, 44, 45, 53, and 53. TCCC should further be ordered to withdraw its General Objection No. 10. Finally, Pom Wonderful requests that the Court's order require TCCC to produce its documents within ten (10) calendar days of the order's issuance.

B. TCCC's Conclusion

For all the reasons stated above, TCCC respectfully requests that the Court not permit Pom to pursue discovery aimed directly at claims that have been dismissed from this action. Accordingly, no responses to the document requests listed above should be required because they all seek discovery of documents related solely to the formal name and labeling of the Minute Maid juice blend product.

Dated: July 10, 2009

ROLL INTERNATIONAL CORPORATION
LEGAL DEPARTMENT

By: /s/ Daniel S. Silverman
Daniel S. Silverman
Attorneys for Plaintiff
POM WONDERFUL LLC

Dated: July 8, 2009

MUNGER, TOLLES & OLSON LLP

By: /s/ Martin D. Bern
Martin D. Bern
Attorneys for Defendant
THE COCA-COLA COMPANY